

PCS PRIMECO, L.P.

May 19, 1995

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William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Mail Stop Code 1170
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: PCS PRIMECO, L.P.

DOCKET FILE COPY ORIGINAL

- Consolidated Opposition to Request to Stay Licensing of the
Broadband PCS Block A/B MTA Frequencies
- PP Docket No. 93-253/ET Docket No. 92-100
- File Nos. 00004-CW-L-95, et al.

Dear Mr. Caton:

On behalf of PCS PRIMECO, L.P., enclosed for filing are an original and four copies of its Consolidated Opposition to three Requests for Stay of MTA Block A and B PCS licensing, filed May 12, 1995 by the National Association of Black Owned Broadcasters, Inc., Percy Sutton and the National Association for the Advancement of Colored People, Washington Bureau; and by Communications One, Inc. and GO Communications Corporation. (A full listing of the proceedings and dockets is included in the caption of the enclosed Consolidated Opposition.) On Monday, May 22, PRIMECO will submit the requisite microfiche copies of this filing.

Please contact us should you have any questions concerning this filing.

Sincerely yours,

PCS PRIMECO, L.P.

William L. Roughton, Jr.
By: William L. Roughton, Jr.

cc: Rosalind K. Allen
Regina Keeney
(hand delivery, complimentary copy)

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ORIGINAL

BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554

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MAY 19 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Implementation of Section 309(j)
of the Communications Act —
Competitive Bidding

Requests for Stay and
Deferral of MTA Commercial
Broadband PCS Licensing and

Applications of PCS PRIMECO, L.P.
for Broadband PCS Licenses

PP Docket No. 93-253

ET Docket No. 92-100

File Nos. 00004-CW-L-95, 00011-CW-L-95,
00023-CW-L-95, 00025-CW-L-95,
00027-CW-L-95, 00031-CW-L-95,
00037-CW-L-95, 00043-CW-L-95,
00063-CW-L-95, 00071-CW-L-95,
00091-CW-L-95

DOCKET FILE COPY ORIGINAL

CONSOLIDATED OPPOSITION

PCS PRIMECO, L.P.

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May 19, 1995

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SUMMARY

PCS PRIMECO, L.P. (“PRIMECO”) hereby opposes several requests for stay filed by self-professed prospective designated entity bidders and interest groups (“Petitioners”) seeking to delay licensing of the A and B Block MTA PCS frequencies. These stay requests are procedurally defective and unmeritorious and should be summarily denied.

Each of the stay requests violates Section 1.44(e) of the Commission’s rules because each was not filed as a separate pleading. In any event, the pleadings fail to meet established requirements for grant of a stay. First, Petitioners have shown no likelihood of success on the merits. They have completely misread some of the Commission’s obligations under the Omnibus Budget Reconciliation Act, and neglected to address others. Petitioners have also ignored the Commission’s comprehensive licensing scheme requirements, which comply fully with those statutory obligations. For these reasons, Petitioners’ claims regarding MTA licensees’ headstart and other competitive advantages are without merit and no violation has occurred.

Second, Petitioners have not demonstrated that they will incur irreparable harm in the absence of the stay. Petitioners’ alleged injuries are unfounded, speculative, or without factual support. In addition, Petitioners fail to account for advantages enjoyed as a result of A/B Block licensing. Further, the majority of their claimed “injuries” would not be redressed by grant of the requested stay.

Third, others will be harmed if the stay is granted. The A/B Block winners have paid significant downpayment amounts for the winning markets and have expended significant resources in reliance on the MTA licensing process. PRIMECO is ready, willing and able to move forward and build out its PCS system and deliver service to the public. Any licensing delay

is enormously harmful to PRIMECO and the other winning applicants. More importantly, delay will injure the public.

Just this April, the Commission declined to defer A/B Block licensing “because of overriding public interest in rapid introduction of service to the public.” The public’s interest in rapid introduction is no less compelling today. Petitioners have not demonstrated how the public interest will be furthered by a stay and their requests should be denied.

BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554

In the Matter of)	
)	
Implementation of Section 309(j))	PP Docket No. 93-253
of the Communications Act —)	
Competitive Bidding)	ET Docket No. 92-100
)	
Requests for Stay and)	File Nos. 00004-CW-L-95, 00011-CW-L-95,
Deferral of MTA Commercial)	00023-CW-L-95, 00025-CW-L-95,
Broadband PCS Licensing and)	00027-CW-L-95, 00031-CW-L-95,
)	00037-CW-L-95, 00043-CW-L-95,
Applications of PCS PRIMECO, L.P.)	00063-CW-L-95, 00071-CW-L-95,
for Broadband PCS Licenses)	00091-CW-L-95
)	

CONSOLIDATED OPPOSITION

PCS PRIMECO, L.P. ("PRIMECO")¹ hereby opposes several Requests for Stay filed by self-professed prospective designated entity ("DE") bidders and interest groups seeking a delay in the licensing of the A and B Block MTA PCS frequencies. Specifically, PRIMECO opposes three stay filings made May 12, 1995: (1) a Request for Stay filed by the National Association of Black Owned Broadcasters, Percy Sutton and the National Association for the Advancement of Colored People (collectively "NABOB"), filed as part of a Petition to

¹ PRIMECO is a limited partnership comprised of PCSCO Partnership (owned by NYNEX PCS, Inc. and Bell Atlantic Personal Communications, Inc.) and PCS Nucleus, L.P. (owned by AirTouch Communications, Inc. and U S WEST, Inc.).

Deny;² (2) a second Request for Stay filed by NABOB in connection with an Application for Review of a prior Wireless Telecommunications Bureau decision denying an earlier Emergency Motion to Defer A/B licensing filed by Communications One, Inc. ("CI");³ and (3) yet another Request for Stay, this one included as part of a joint CI/GO Communications Corporation ("GO") filing seeking reconsideration of the *CI Order*.⁴ NABOB seeks to stay licensing of the A/B Block frequencies until the Commission is ready to license the C Block frequencies; CI/GO seeks a delay in the licensing of three applicants, PRIMECO, AT&T and WirelessCo, pending the conclusion of the C Block auction.

Although filed in separate proceedings and as part of other filings,⁵ Petitioners' stay requests make similar arguments in support of their claims. Accordingly, PRIMECO hereby files the instant Consolidated Opposition.⁶ For the reasons stated herein, the stay requests are defective and unmeritorious. They should be summarily denied.

² See NABOB Petition to Deny and Request for Stay (May 12, 1995) ("NABOB Stay Request 1"). NABOB, *et al.* have filed this petition against all 99 of the MTA Block A/B PCS applications.

³ See NABOB Application for Review and Request for Stay (May 12, 1995) ("NABOB Stay Request 2"). See also CI Emergency Motion to Defer MTA PCS Licensing, filed March 8, 1995; *Deferral of Licensing of MTA Commercial Broadband PCS, Order*, GN Docket No. 93-253, ET Docket No. 92-100, DA 95-806 by Chief, Wireless Telecommunications Bureau (released April 12, 1995) ("*CI Order*").

⁴ See CI/GO Petition for Reconsideration by the Full Commission of Denial of Communications One, Inc. Emergency Motion to Defer MTA PCS Licensing (May 12, 1995) ("CI/GO Stay Request"). NABOB and CI/GO are collectively referred to herein as "Petitioners."

⁵ See discussion *infra* at Section II.

⁶ To the extent a waiver is needed for purposes of acceptance of this consolidated filing, PRIMECO hereby requests such a waiver.

I. STATEMENT OF INTEREST

PRIMECO was the winning bidder for 11 markets in the recently concluded broadband PCS A/B Block auction. On November 17, 1994, PRIMECO submitted a \$54,666,431 upfront payment in order to participate in the auction; thereafter, on March 20, 1995 PRIMECO submitted an additional \$166,778,769, to bring its total downpayment up to 20% of the winning amount bid for the 11 markets won (or \$221,445,200). On April 5, 1995, PRIMECO submitted 11 long-form Form 600 applications for its winning MTA markets. Together, winning bidders have submitted a total of \$1.4 billion in deposit money with the Commission. Upon license grants, an additional \$5,615,523,038 will be due from PRIMECO and the other MTA market winners (representing the total winning bid amount of \$7,019,403,797 for the 99 licenses).

Obviously, any delay in the processing of the A/B Block licenses is tremendously prejudicial and detrimental to PRIMECO, as well as to the other winning MTA license applicants.⁷ More importantly, licensing delay directly contravenes an express, critical Congressional objective — the rapid deployment of PCS services — and thus disserves the public interest.⁸ No legitimate reason has been presented by Petitioners to support the MTA licensing delay. Under the circumstances, the Commission should expeditiously consider and act on the various NABOB and CI/GO stay requests.

⁷ See correspondence from Mr. George F. Schmitt, President and Chief Executive Officer, PRIMECO, to Chairman Reed E. Hundt, dated March 23, 1995.

⁸ 47 U.S.C. § 309(j)(3)(A) (Supp. 1995).

II. THE REQUESTS FOR STAY ARE PROCEDURALLY DEFECTIVE

Section 1.44(e) of the Commission's rules specifically requires that a request for stay of Commission action be filed as a separate pleading; any request which is not so filed "will not be considered by the Commission."⁹

On May 12, 1995, NABOB filed two Requests for Stay, both of which were improperly combined with other pleadings filed the same date.¹⁰ The third stay request was filed by CI/GO, in combination with a Petition for Reconsideration of the *CI Order*.¹¹ Each of these consolidated filings violate Section 1.44(e), and is therefore subject to dismissal.¹²

While the stay requests are procedurally defective, they are also substantively infirm. Because of the public interest in the expeditious resolution of the issues raised regarding MTA license processing, PRIMECO hereby responds to the substance of the NABOB and CI/GO arguments. As demonstrated herein, these parties have failed to meet established requirements for grant of a stay and thus their stay requests should be denied.

⁹ 47 C.F.R. § 1.44(e) (1994) (emphasis added).

¹⁰ The first NABOB stay request pleading was combined with a Petition to Deny all 99 applications for the broadband PCS MTA licenses filed by winning bidders. *See* NABOB Stay Request 1. The second NABOB stay request was combined with an Application for Review of the *CI Order*. *See* NABOB Stay Request 2.

¹¹ *See* CI/GO Stay Request. PRIMECO notes that the CI/GO stay request was not titled as such. However, a review of the pleading indicates that CI/GO is seeking a stay of the licensing of three of the MTA winners, including PRIMECO. *See id.* at 14-16.

¹² PRIMECO intends to separately respond to NABOB's Petition to Deny and Application for Review and CI/GO's Petition for Reconsideration.

III. THE REQUIREMENTS FOR A STAY OF THE MTA LICENSING PROCESS HAVE NOT BEEN MET

It is well-established that a party seeking a stay must meet the four-pronged test articulated by the D.C. Circuit in *Virginia Petroleum Jobber's Ass'n v. FCC*.¹³ Specifically, Petitioners must show (1) a strong likelihood of prevailing on the merits; (2) irreparable harm if the stay is not granted; (3) the absence of harm to others if the stay is granted; and (4) that the public interest will be served if the stay is granted. Petitioners fail to satisfy each of these requirements.

A. Petitioners Have Shown No Likelihood of Success on the Merits

Petitioners assert that they are likely to prevail on the merits of their petitions to deny because the Commission's granting of the A/B Block licenses prior to licensing the C Block auction winners will constitute a violation of the Commission's statutory obligation under Section 309(j) of the Communications Act, 47 U.S.C. § 309(j).¹⁴ Petitioners maintain that the Commission's failure to provide designated entity bidding preferences for all PCS frequency blocks (and not just the C and F Blocks) will result in a violation of the Act. Petitioners allege that by licensing the A/B Block winners first, the Commission will give these carriers an unfair competitive "headstart" advantage over C Block bidders. Petitioners also allege that licensing the A/B

¹³ 259 F.2d 921 (D.C. Cir. 1958); see *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

¹⁴ NABOB Stay Request 1 at 9-16; NABOB Stay Request 2 at 10-18; CI/GO Stay Request at 14. As noted, CI/GO seek to defer licensing of the so-called "largest [MTA] winners" — PRIMECO, AT&T and WirelessCo. CI/GO Stay Request at 5.

Block winners first will result in an excessive concentration of licenses in the hands of a few dominant companies, again in contravention of Section 309(j).¹⁵

Petitioners' arguments are based on a complete misreading of the Omnibus Budget Reconciliation Act ("Budget Act"). In their zeal to claim competitive "foul," Petitioners also ignore the Commission's PCS licensing scheme requirements which were adopted pursuant to notice and comment rulemaking proceedings. In fact, no statutory violation has occurred in the MTA licensing scheme or through the MTA auction process.

1. The Commission Has No Affirmative Duty to Guarantee That Designated Entities Obtain PCS Licenses

Under the Budget Act, the Congress sought to facilitate the competitive and rapid deployment of PCS services to the public. The express purposes of the Budget Act in this area were several-fold. Congress directed the Commission to establish a competitive bidding methodology for all auctionable frequencies, and directed the Commission to "*seek to promote*" certain specified objectives in so doing. These objectives were:

- The development and rapid deployment of services without administrative and judicial delay;
- The promotion of economic opportunities by avoiding excessive concentration of licenses and disseminating licenses among a wide variety of applicants, including small businesses, rural telcos, and businesses owned by minority groups and women;

¹⁵ NABOB Stay Request 1 at 9-14; NABOB Stay Request 2 at 10-15; CI/GO Stay Request at 7-14.

- The recovery for the public of a portion of the value of the spectrum auctioned; and
- Efficient and intensive use of the electromagnetic spectrum.¹⁶

In establishing these objectives, Congress left to the Commission's discretion which particular methodology should be employed to ensure compliance with these objectives. Further, Congress specifically did not set aside licenses for any particular group, minority or otherwise. Indeed, Congress gave the Commission explicit instructions not to construe the Act to predetermine the outcome of PCS licensing.¹⁷ Again, Congress did not mandate that the Commission grant licenses to designated entities — rather, it sought only to ensure that economic opportunities were made available so that a variety of groups, including small and minority-owned businesses, could participate in the competitive bidding process.¹⁸

2. **The Commission Has Fully Complied with its Statutory Obligation to Promote Designated Entity Participation in the Competitive Bidding Process**

In implementing the PCS broadband licensing scheme, the Commission closely adhered to Congress' objective of promoting broad-based participation in competitive bidding. In fact, the Commission has gone "above and beyond" its statutory obligation by setting aside

¹⁶ 47 U.S.C. § 309(j)(3)(A-D). While Petitioners often cite the Budget Act objectives, they ignore certain of those objectives entirely — *e.g.*, the objective of rapid development/deployment of PCS services without delay. *Id.*

¹⁷ H.R. Rep. No. 111, 103rd Cong., 1st Sess. at 256-57 (1993) ("*House Report*").

¹⁸ *Id.* at 255-56. In this regard, Congress recognized that some services would be inherently national in scope, while other services would be local and well-suited for small business participation. *Id.* at 254.

frequencies for designated entities.¹⁹ In addition, conspicuously absent from Petitioners' stay requests are any reference to a number of Commission rules which have been established to ensure (1) that meaningful opportunities for designated entities are fully present; and (2) that there will be a wide dissemination of licenses in a wide variety of geographic areas, and to a wide variety of entities. A review of the Commission's PCS orders and rules makes this conclusion inescapable.

First, the Commission has established a number of different frequency blocks, of varying sizes and service areas for PCS license auctioning, a fact which guarantees that PCS licenses will not be concentrated in the hands of a few licensees. Two 30 MHz MTA blocks (A and B) were established for a nationwide service; a third 30 MHz BTA block (C), was set aside for designated entity participation. An additional 10 MHz BTA block (F) was set up as a second designated entity block; and two additional 10 MHz BTA blocks (D and E) were also established.²⁰

The Commission allocated PCS spectrum in this way to reduce capital costs for designated entities and to ensure that established companies would not dominate the market.²¹ Indeed, a number of the companies targeted by NABOB here advocated substantially different

¹⁹ As noted above, the Commission had no statutory obligation to adopt this particular measure.

²⁰ *Memorandum Opinion and Order*, GEN Docket No. 90-314, 9 FCC Rcd. 4957, 4975-88 (1994) ("*PCS Reconsideration Order*"); *Fifth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd. 5532, 5587-88 (1994) *recon. pending* ("*Fifth R&O*").

²¹ *Fifth R&O* at 5579.

bandwidth assignments and service areas; these proposals were rejected by the Commission on the basis that they might lead to fewer service providers and deter new entrants.²²

Moreover, the Commission imposed varying attribution limits on PCS and cellular ownership interests, again to ensure that there would not be excessive concentration of licenses in the hands of a few controlling entities.²³ The Commission also adopted specific spectrum aggregation limits to ensure “that no individual or person or a single entity is able to exert undue market power through partial ownership in multiple PCS licensees in a single service area.”²⁴ Pursuant to Commission rules, PCS licensees may not have an ownership interest in frequency blocks that total more than 40 MHz and which serve the same geographic area.²⁵ In addition, the Commission imposed even more rigid limits on the amount of PCS spectrum which may be held by cellular licensees in areas where there is a significant overlap between the designated PCS service area and a cellular licensee’s service area.²⁶ Similarly, the Commission established a

²² *PCS Reconsideration MO&O* at 4978-82.

²³ *Id.* at 4997-5010.

²⁴ *Second Report and Order*, GEN Docket No. 90-314, 8 FCC Rcd. 7700, 7728 (1993) (“*Second R&O*”).

²⁵ *See* 60 Fed. Reg. 26375 (1995) (to be codified at 47 C.F.R. § 24.229). A 45 MHz spectrum “cap” has also been placed on CMRS providers in general. 59 Fed. Reg. 59945 (1994) (to be codified at 47 C.F.R. § 20.6).

²⁶ *Second R&O* at 7744. *See* 50 Fed. Reg. 32830 (1994) (to be codified at 47 C.F.R. § 24.204).

separate rule for designated entity licenses, which limits the number of licenses applicants may obtain in the C and F Blocks.²⁷

No doubt, the Commission was aware of the likelihood that larger companies would bid on and obtain the A/B Block MTA licenses because of the fact that the licenses were for larger geographic service areas, and did not include specific discounts or preferences for designated entity participation.²⁸ Despite the lack of bidding preferences in the A/B Block auction, however, both large and small companies placed bids and large companies were not the only winners. There is, in fact, diversity among the A/B Block auction winners, with respect to size, ownership and numbers.²⁹ Importantly, the Commission's rules did not prevent small businesses or minority bidders from participating in the A/B Block auctions, and Petitioners' suggestions to the contrary are specious.

Clearly, the Commission has established requirements which ensure that there will be (1) a wide dissemination of licenses to a wide variety of PCS licensees; (2) meaningful opportunity for designated entities to bid for PCS licenses; and (3) no excessive concentration of licenses. Contrary to Petitioners' claims, the Commission has fully complied with Section 309(j).

²⁷ See 59 Fed. Reg. 53463 (1994) (to be codified at 47 C.F.R. § 24.710) (stating that no applicant may be deemed the winning bidder of more than 98 (10 percent) of the licenses available for frequency blocks C and F).

²⁸ See *Fifth R&O* at 5579-80.

²⁹ For example, South Seas Satellite Communications Corp., one of the A/B Block winners, is a small woman-owned business. Polka Lambro Telephone Cooperative, Inc., another winner, is a cooperative association providing telephone service in rural Texas, hardly a dominant telecommunications entity. Centennial Cellular Corporation, yet another winner, is a cellular telephone operator located in New Canaan, Connecticut. Moreover, there were 18 winning MTA applicants.

3. Petitioners' Headstart Claims Are Without Merit

In support of the claim that the Commission's efforts have resulted in a violation of Section 309(j), Petitioners again argue that the A/B Block winners will be given an unfair headstart over C Block PCS licensees — a headstart that will allegedly undermine the latter's competitive position. The headstart argument, however, has been raised and rejected — both in the competitive bidding proceeding, and in the cellular licensing context where similar arguments were first raised. Once again, no Section 309(j) violation is presented.³⁰

First, Section 309(j) does not expressly require the Commission to consider an alleged "headstart" as a factor in its licensing rules, and to the extent that the headstart goes to the Petitioners' claim of excessive concentration, Congress expressly relegated the issue of excessive concentration to the Commission's broad discretion for resolution.³¹ Further, to the extent that this issue is relevant to Petitioners' claim that the headstart undermines bidding opportunities for designated entities, Petitioners have conveniently ignored the Commission's no less important statutory obligation to promote rapid deployment of PCS services to the public. Indeed, Congress' concern for the delays and inefficiencies of the lottery licensing process dominate Section

³⁰ PRIMECO notes that NABOB, CI and others have previously raised headstart arguments and have been unsuccessful. These arguments in the context of the stay requests are improper and untimely attempts to seek reconsideration of prior Commission decisions on this issue.

³¹ *House Report* at 254.

309(j)'s legislative history.³² In the PCS arena, that concern manifests itself in the imposition of a quick deadline to commence PCS licensing³³ and in Section 309(j) itself.³⁴

The Commission has properly incorporated Congress' concern for rapid deployment of service into its administration of the auction process. In the *Fourth Memorandum Opinion and Order*, for example, the Commission affirmed its decision to use a sequence of auctions to license broadband PCS.³⁵ There, the Commission expressly rejected the argument that the staggered PCS auctioning sequence needed to be revised to prevent the A/B Block winners from gaining an unfair headstart over other PCS licensees.³⁶ The Commission concluded that auctioning the A/B Block first would provide designated entities with important information about the value of PCS licenses which would, in turn, assist DEs in attracting capital and formulating bid strategies. The Commission also declined to delay the final licensing of the A/B Block winners, noting that the overriding public interest in rapid deployment of service outweighed the risk of a possible headstart advantage to the A/B Block winners.³⁷ As noted above, Petitioners are improperly seeking reconsideration of these decisions.

In addition, the Wireless Telecommunications Bureau has already followed the *Fourth Memorandum Opinion and Order* in ruling on CI's earlier motion to defer A/B Block

³² See, generally, *House Report*.

³³ See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(d).

³⁴ See Section 309(j)(3)(A).

³⁵ *Fourth Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd. 6858, 6863-64 (1994).

³⁶ *Id.*

³⁷ *Id.* at 6864.

licensing. The Bureau appropriately found that staying A/B licensing would undermine the public interest in rapid PCS service deployment and also noted that staggered licensing gives later bidders valuable information concerning the business planning and deployment activities of the A/B Block winners.³⁸ There, the Bureau also found CI's "emergency motion" amounted to an "untimely petition for reconsideration of the Commission's prior decision."³⁹

Headstart arguments were also previously raised and rejected in the cellular context — where a similar effort to delay licensing of wireline companies was posed.⁴⁰ The Commission at that time agreed to consider moratorium requests for wireline licensing if the nonwireline cellular applicant could demonstrate public interest harm resulting from wireline's alleged headstart, but no parties filing such requests met the necessary burden.⁴¹

Importantly, the Commission's and industry's experience in cellular utterly belies the headstart claims raised by Petitioners. First, despite the vitriolic headstart charges made at the outset of the cellular licensing process, nonwireline cellular winners have proven to be effective competitors of the wireline-affiliated carriers. In all cellular markets, there is competitive parity between the A and B Block carriers. Thus, there was no meaningful (or lasting) competitive advantage to being licensed first. In addition, recent penetration figures for cellular reflect that

³⁸ *CI Order* at ¶¶ 6-7.

³⁹ *Id.* at ¶ 5.

⁴⁰ *Inquiry Into the Use of Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems, Report and Order*, 86 FCC 2d 469, 491 n.57 (1981), *recon.*, 89 FCC 2d 58 (1982).

⁴¹ *See Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, First Report and Order and Memorandum Opinion and Order on Reconsideration*, 6 FCC Rcd. 6185, 6226 (1991).

approximately 10% of the country receives cellular service,⁴² leaving enormous marketing and service opportunities for non-cellular entities. Clearly, numerous competitive opportunities remain open to prospective C Block PCS bidders and other wireless service providers; moreover, post-auction transactions and resale opportunities will likely be present.⁴³ Thus, based on the experience with cellular, and the vast untapped market for wireless services generally, significant opportunities for wireless entry remain. Prospective C Block bidders — as well as D, E and F Block bidders — will not be shut out of the nascent PCS market, and will in fact have a full and fair opportunity to compete.⁴⁴

⁴² See Donaldson, Lufkin & Jenrette, Winter 1994-95 Wireless Communications Industry at 13, Table 4; 1995 Wireless Industry Survey Results: "American Success Story" Continues, March 13, 1995 (CTIA Press Release).

⁴³ The Commission has tentatively concluded that "the existing obligations on cellular providers to permit resale should be extended to apply to CMRS providers, unless there is a showing that permitting resale would not be technically feasible or economically reasonable for a specific class of CMRS providers." *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, FCC 95-149, *Second Notice of Proposed Rule Making*, PP Docket No. 93-252 at ¶ 83 (released Apr. 20, 1995). This prohibition on resale restrictions is specifically designed to, *inter alia*, mitigate headstart advantages among licensees. *Id.* at ¶ 84.

⁴⁴ Petitioners appear unconcerned about any possible competitive injury which would presumably be felt by later PCS entrants (D, E and F Block licensees). Taken to its logical (or illogical) extreme, however, Petitioners would presumably argue that no PCS licensing should occur until all PCS blocks had been auctioned; and there should be a moratorium on the addition of new cellular customers by existing carriers as well. Obviously, this would be an absurd result, contrary to statutory requirements for rapid PCS deployment and the public interest.

**B. Petitioners Have Not Demonstrated Irreparable Harm
in the Absence of A Stay**

Petitioners have failed to show that they will be irreparably harmed by the prompt grant of the A/B Block licenses; further, the alleged injuries they claim are purely speculative and without factual support.

NABOB alleges that prospective C Block bidders will experience loss of access to capital if the “[C Block] timing of bidding is substantially behind the recently completed A and B bidding.”⁴⁵ Assuming *arguendo* that there was any factual support for this claim, grant of the requested stay will not address this concern. NABOB also claims injury through “[l]oss of base station cell sites [and] . . . access to distributors and retailers.”⁴⁶ Once again, grant of the stay will not address these claimed injuries — even if they were documented.⁴⁷

Petitioners also complain that the uncertainty regarding the timing of the C Block auction has negatively impacted DE investment opportunities.⁴⁸ Again, no support is provided for this statement. Because uncertainty regarding timing of the C Block licensing will remain, a stay of A/B licensing will not solve any perceived problem in this area. Also, assuming *arguendo* that DE investment opportunities have been negatively impacted, Petitioners fail to address other critical factors — such as concerns regarding the constitutionality of the minority preference

⁴⁵ NABOB Stay Request 1 at 17 (emphasis added); NABOB Stay Request 2 at 19.

⁴⁶ *Id.*

⁴⁷ Further, assertions of injuries of this type, even if documented, have been found by the courts not to be the type of irreparable harm which warrants grant of a stay. *See Virginia Petroleum*, 259 F.2d at 925 (“Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.”).

⁴⁸ CI/GO Stay Request at 11-12.

scheme — which may be affecting DE investment decisions.⁴⁹ Again, grant of the stay requests will not remedy Petitioners' professed concerns. Moreover, Petitioners simply ignore certain advantages created by the staggered auction and licensing process for later PCS bidders.⁵⁰

Finally, Petitioners again argue that the A/B winners will enjoy an unfair and insurmountable competitive advantage over C Block entrants. For reasons discussed above, these claims are meritless and should be rejected.⁵¹

C. Others Will be Harmed if the Stay is Granted

NABOB makes the remarkable claim that the only parties affected by the stay are the A/B winners and, further, that the A/B winners will not suffer much from the requested licensing delay.⁵² For its part, CI/GO claim that a stay would not injure the three “principal” A/B Block winners. CI/GO also claim the government will benefit from the stay because it will receive higher payments for the C Block spectrum.⁵³

These claims reflect enormous shortsightedness, if not outright arrogance on Petitioners' part. In addition to the significant harm A/B winners will experience from any delay, the public at large will also be injured by a stay grant and delay in A/B licensing. Further, CI/GO's claim that the government will somehow benefit from delay in A/B licensing is unfounded, speculative and irrelevant.

⁴⁹ See *Telephone Electronics Corp. v. FCC*, No. 95-1015 (D.C. Cir. Order Mar. 15, 1995); *Adarand Constructors, Inc. v. Federico Pena, Secretary of Transportation, et al.*, 115 S. Ct. 41 (1995) (oral argument Jan. 17, 1995).

⁵⁰ See *supra* note 36 and accompanying text.

⁵¹ See discussion *supra* Section III.

⁵² NABOB Stay Request 1 at 18; NABOB Stay Request 2 at 19.

⁵³ See CI/GO Stay Request at 15.

The A/B winners have participated in an expensive and lengthy auction process and have paid significant down payment amounts for the winning markets. They have filed applications to demonstrate their financial, legal and other qualifications to be Commission licensees. As noted, PRIMECO, for one, has paid \$221,445,200 as its 20% downpayment for the eleven license markets where it was the high bidder. Total downpayment deposits (of 20% of the winning bid amounts) submitted by other winning bidders amount to \$1.4 billion. Full downpayments by all winning bidders were submitted on March 20, 1995, and are not subject to interest payments during any licensing delay. Further, to date, the Commission has made no provision for repayment of these enormous sums in the event that A/B licensing is delayed for an extended time. In addition, PRIMECO has developed business plans, hired personnel and expended start-up business expenses to date. It is ready, willing and able to move forward and build out its PCS system and deliver service to the public. PRIMECO presumes that the other winning bidders are similarly situated. Obviously, and contrary to Petitioners' naive and disingenuous claims, PRIMECO and all other winning A/B bidders are significantly harmed by any delay in MTA licensing.

More importantly, Petitioners' disdain for the public interest is troubling. A central premise of the Budget Act was to facilitate rapid deployment of PCS services to the public.⁵⁴ A stay will obviously undermine this objective without corresponding benefit. As discussed above, claims that the stay is needed to remedy violations of Section 309 are unfounded; no violation has occurred.

⁵⁴ See *supra* note 16 and accompanying text.

CI/GO also argue that, without a stay, PRIMECO, AT&T and WirelessCo will dominate the PCS and CMRS marketplace. These claims are foolhardy. As discussed earlier, many wireless technologies and competitors will have enormous business opportunities to develop successful service offerings. The Commission has taken effective measures to ensure that there will be a wide dissemination of licenses to a number of entities.

Finally, CI/GO's claim of a government "benefit" somehow resulting from grant of the stay is absurd. Winning MTA bidders have committed to pay some \$7 billion dollars for licenses for the 99 MTA markets. (PRIMECO, AT&T and WirelessCo placed high bids totaling some \$4,901,723,168 of that amount.) Obviously, the government is harmed by any delay in payment of these sums. The claim that the government will somehow receive more money if the A/B licensing is deferred is unsupported and irrelevant to the stay analysis.⁵⁵

D. The Public Interest Would Not be Served By Grant of a Stay

The Commission has already declined "to delay finalizing the award of A and B block licenses . . . because of overriding public interest in rapid introduction of service to the public."⁵⁶ The Congressional mandate to promote the development and rapid deployment of PCS for the benefit of the public requires prompt licensing of qualified A/B Block market winners

⁵⁵ CI/GO is also inconsistent in their arguments on this point. First, they argue that the government should not consider the delay in receiving the A/B Block winning sums (citing Section 309(j)(7)(A) which prohibits revenue generation from being "determinative" of FCC auction policies). In the next sentence, however, CI/GO argue that the government will receive more revenue if the licensing of PRIMECO, AT&T and WirelessCo is delayed. CI/GO Stay Request at 15. Moreover, ironically, if CI/GO's claims are correct about the impact of A/B licensing, they and other prospective C Block bidders will be the ones who benefit if C Block license bid amounts are lower.

⁵⁶ *CI Order*, at ¶ 7; *Fourth MO&O*, at 6864.

without delay.⁵⁷ In short, Petitioners have not demonstrated how the public interest will be furthered by a stay.

CONCLUSION

Many of the arguments raised in the stay requests have been previously raised before the Commission and rejected — most recently in the April 12 *CI Order* denying CI's earlier motion to defer A/B licensing. There, the Commission dismissed CI's headstart argument, finding that CI's "contention that subsequent PCS licensees will be fatally hamstrung in their ability to compete against A and B Block licensees is purely speculative[,]” and that even if A/B licensees obtain some benefit from being licensed before other PCS providers, “numerous competitive opportunities remain open to subsequent PCS entrants.”⁵⁸ The Commission also determined that designated entities would derive benefits from earlier auctioning of the A/B Blocks. Importantly, the Commission found that “the public interest in rapidly providing new competitive sources of wireless services outweighs any possible competitive harm that might result from the A and B Block licensees being licensed ahead of auction winners in other PCS blocks.”⁵⁹

⁵⁷ See 47 U.S.C. § 309(j)(3)(A).

⁵⁸ *CI Order* at ¶ 6.

⁵⁹ *Id.* at ¶ 7 (emphasis added).

For the reasons discussed herein, Petitioners' stay requests should be expeditiously denied and processing of the A/B Block license applications should be completed.

Respectfully submitted,

PCS PRIMECO, L.P.

A handwritten signature in dark ink, appearing to read "William L. Roughton, Jr.", is written over a horizontal line.

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